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LEGAL AID: AN OPPORTUNITY FOR THE AMERICAN BAR

E. CLINTON BAMBERGER, JR.*

The poor people—one fifth of this nation who live the emasculating contradiction of poverty in an affluent society—do not have equal justice. The deprivation of justice for the poor weakens—and indeed even threatens—the viability of our society.

The poor do not have equal justice because they do not have lawyers. Lawyers make our laws just and unless the poor have advocates for their cause—they will not have equal justice. A massive body of our law is considered only by the executive and legislative branches of our government—but never considered, scrutinized and interpreted by the judiciary. Legislators and administrators are not omniscient—what they do is improved when what they *did* is debated by lawyers and interpreted and applied by a judge whose mind has been sharpened and enlightened by advocacy.

A search for truth and justice which depends upon an adversary system gropes half-blind when there is no advocate for one side of the proposition.

It is fair to judge the success of American justice—and the need for this Program of Legal Services to the Poor—by considering the administration of justice in civil courts.

We can visit countless courtrooms in which civil trials are held and observe temperate and intelligent judges listening to competent counsel defend the interests of affluent clients. But what would we see if we visited a Small Claims Court, with jurisdiction limited to several hundred dollars that serves primarily as a collection agency for retail merchants and installment credit vendors? Or a Domestic Relations Court, where a stream of women on the public assistance rolls comes to swear out contempt citations against the husbands or boyfriends who left them penniless and pregnant? Or a Landlord and Tenant Court inundated by petitions for evictions of impoverished tenants of marginal housing?

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The court's day passes in a tedious litany of names, each followed by the single word "judgment" droned out by the landlord's or merchant's attorneys. Evictions issue unchallenged, writs of repossession are signed in bundles and default judgments are the course of the day. The poor are not represented. Judgments are rarely denied, and as the clerk docketts the judgment or issues the writ of garnishment, repossession or eviction another loss is tallied on the score of a man or woman who probably has an inadequate education; a menial, degrading and irregular job, a broken marriage and a brood of illegitimate children.

I could extend indefinitely the catalogue of disabilities suffered by the poor in our judicial system. They sign installment contracts with unscrupulous merchants, they go on relief and spend their lives hiding from arbitrary administration of welfare regulations; and they live in rat-infested, often-unheated slums without ever knowing that the law requires landlords to provide them with heat in the winter. They are too ignorant and too intimidated to be able to obtain their legal rights—without the advice and advocacy of lawyers.

I do not wish to discuss the fact that justice for the poor man in America has not succeeded, or to engage in a vague and general clucking about that which all will agree is a most unfortunate situation.

Instead, I intend to discuss a vastly more difficult question: the question of what members and leaders of the organized bar, can, should, and I hope will do to assure equal justice for the poor. It is not my desire merely to obtain their tolerance of the Office of Economic Opportunity's Program to Provide Legal Services to the Poor, but to persuade them that they should lead the revolution that will bring America's poor out of their bondage and into the promised land of full equality before the law. I proffer to them the opportunity to serve as the leaders and lawgivers of a revolution conducted for the benefit of people who are poor, inarticulate, unsophisticated—and who do not have advocates.

Some may think it curious to consider lawyers as leaders of a revolution. Yet, no role could be more true to the traditions of our profession. Since the days when all land in England was owned by the king, and lawyers devised ways to make property alienable, lawyers have led the struggle to destroy archaic forms and to free their clients from the mortmain of the past. In our own country, lawyers developed the corporate forms of business enterprise that have given American business freedom to grow according to the laws of economics. In our own time, I need only point to the brilliant work of lawyers during the era of the New Deal and the lawyers in the civil rights movement during the past decade

to demonstrate what a crucial role effective representation and advocacy can play in changing the posture of our nation.

It is and has been for centuries the task of lawyers to change the *status quo*. In every case that turns on the law rather than the facts, a lawyer is attempting to persuade a court that the law should not be interpreted as it has been in the past, but should be given a new interpretation.

It is fallacious to think of lawyers as guardians of tradition—rather we are the guardians and watchdogs of orderly change. It is perhaps the greatest genius of the Anglo-American system that we have always, except when confronted with the terrible agony of the Civil War, been able to change the deepest and most fundamental characteristics of our society peacefully, with the stability of government and laws that is the awe and envy of other nations.

Today, we are asked once again to follow brilliant tradition. Lawyers are exhorted to guide, control and direct a change in our society. I ask them to put their traditions and skills to work, not for the benefit of the corporations, not for the benefit of the federal government, but for the benefit of the poor. I ask the legal profession to lead the struggle to provide economically underprivileged Americans with a full and fair participation in American justice. Specifically, I ask the leaders and members of the legal profession to work actively in their own communities to establish and support programs to provide free legal assistance for people who are poor and cannot employ an attorney. I ask that they challenge the critics who attempt to undermine our effort without knowledge of its goals or character.

It might be helpful to deal briefly with what seems to be a common concern of some lawyers who have expressed at least skepticism, if not opposition, toward the Legal Services Program. That concern might best be expressed as the fear that we will so thoroughly accomplish our task of providing legal services to the poor that attorneys who now draw some or all of their practice from people with lower or lower-middle incomes will find themselves without clients.

This concern stems from a basic lack of understanding about poor people and their communities. It presumes that there is a static quantity of legal work that needs to be done in a given community of poor people, that that work is now being done by attorneys, and that at the introduction of free legal services, the clients of those attorneys will immediately take their business to the free office. These presumptions are not correct.

First, there is not a fixed amount of legal work in a given community. Poor people are constantly confronted by problems that we as attorneys would immediately recognize as legal, but

which they, without education or the custom of consulting a lawyer, never realize might be solved by advocacy or representation. If the poor had the habit of talking to a lawyer, if there was, in the community of the poor, the consciousness of the need for and utility of lawyers, I submit that the volume of problems about which lawyers would be consulted would rise from a trickle to a flood. As evidence of this fact, in 1965, the first year in which the neighborhood law offices were established in Washington, they handled about 5000 inquiries, and the Legal Aid Society at the same time reported the greatest annual volume of cases in its history of fifty years.

Second, it is not true that the legal work of the poor is now being handled by attorneys. How many poor people, for example, hire an attorney to avail themselves of the rights that they have in many jurisdictions to a jury trial on a complaint for eviction for nonpayment of rent? Lawyers are not doing this work now, nor are they giving advice to people who come into conflict with welfare authorities, nor are they advising the many ignorant people who are tempted into signing unfair installment contracts. And these are merely three of the literally hundreds of ways in which lawyers might but are not now representing the poor.

Finally, I do not believe that either the present or the potential clients of attorneys in poor neighborhoods will leave their attorneys in any significant number to enjoy free legal services. Not only is the lawyer-client relationship a highly personal one, but once the Legal Services Program is functioning well, for every client who comes into the "free" office to have his lease examined, ten unexpected clients will retain a private practitioner as a result of the general increase in consciousness of and confidence in the law, legality, and the availability of a defense against injustice which the Legal Services Program will create. Private practice will grow enormously by bringing the poor into our world of the law and lawyers.

I have spoken about the contribution lawyers in general and leaders of the organized bar can make to provide adequate legal representation for the poor. We should agree that the poor are not now adequately represented, and that the quantity and quality of that representation should be improved. The question now is how that should be done.

The predominant method in the Legal Aid movement and OEO's efforts has been the creation of entities similar to law firms which will advise and represent the poor. I know that other methods are possible. But the basic concept of a law firm, with attorneys hired and paid by the firm out of its own funds is, in my judgment, preferable to any of the alternatives which have been presented.

Specifically, I think it is important to point out my concerns about the so-called "English System" and its variations. These are programs whereby some branch of the state or local government or some other organization certifies the indigency of a potential client, who may then consult the private attorney of his choice at the whole or partial expense of the government.

At first glance, the "English System" seems attractive. With only a relatively minor change in our present system of legal representation, it would permit many more people to consult a lawyer. It would also make every lawyer in the community available to the poor, instead of just the small group which may be practicing in a firm of "free" lawyers. This is the so-called "freedom of choice" argument. And finally, the lawyers who perform the services are guaranteed payment, a virtue which needs no further explanation.

But these apparent advantages are, unfortunately, more advantageous for lawyers than for the poor we are committed to assist. Indeed, for the poor, such a plan has at least one major deterrent. The contemplated certification of indigency would require them to submit themselves to another means test by the welfare authorities or their counterparts. It is a certainty that vast numbers of poor people would be too frightened or too proud to place themselves voluntarily in the gears of another bureaucracy, with the result that they simply would not participate in the program at all.

The "English System" is also disadvantageous for another reason that I consider even more important. It clearly can achieve no other goal than the mere resolution of controversies. The Legal Services Program of the Office of Economic Opportunity and the Legal Aid movement have far greater ambitions.

We cannot be content with the creation of systems of rendering free legal assistance to all the people who need but cannot afford a lawyer's advice. This program must contribute to the success of the War on Poverty. Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes and effect of poverty. Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope and ambition. I do not believe that an "English System" which parcels out the legal problems of the poor to lawyers engaged not because they have a singular dedication to assist poor people but because they are members of a bar association or a lawyer referral panel and somehow "chosen freely" by the poor will ever provide the necessary concerted and thoughtful legal analysis and challenge which must occur if the OEO program will be more than

a chain of legal first-aid clinics. Twenty lawyers selected by twenty poor clients on twenty different days to defend eviction notices will never have even the opportunity to learn that every eviction was retaliation for the tenant's complaint of housing code violations and so look for the test case to challenge the consequent perversion of the administration of justice. But three lawyers in a "poor man's law firm" would soon see the common thread and seek the legal remedy to prevent the continued proliferation of the same legal crises.

I also entertain the presumption that an "English plan" is more costly than the provision of free legal services by salaried attorneys. Given a fixed sum of money, I speculate that I could obtain more lawyer assistance by employing a lawyer's full time for a definite period than by dispensing the same money to numerous lawyers in specific fees for services rendered.

But I admit my concerns are speculative. We will approve a very limited number of "English System" applications, evaluate the costs and the results carefully and assess the comparative success of such an approach. We have several preliminary applications for this method; I doubt that we will approve all of them, and I am certain that there is little likelihood that additional applications will be approved. However, we may approve such plans in sparsely populated areas where there is no other reasonable method to provide free legal assistance for the poor.

My attitude about the "English System" is best described by the remark a judge once made about my argument before him: "Mr. Bamberger, I have an open mind about that point—but not necessarily an empty one."

I do not expect that we will find easily the perfect solution to the task we have undertaken. Nor do I imagine that we will answer all the criticisms of the bar and public without leaving some residue of doubt about the rights and wrongs of our specific course of action. I hope that I am not disappointed in my request for the bar's active and enthusiastic support—and for its constructive criticism.

My principal purpose is to convince members of the legal profession that I offer them the opportunity to use their leadership, their wisdom, their skills, and their advocacy on behalf of the poor in the finest traditions of the bar.